SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1788

LOCAL UNIONS NOS. 2188 AND 1974, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY MEMORANDUM

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1. Since the primary role of this Court is to resolve important questions of federal law, the most noteworthy point about the briefs in opposition is that they do not deny that the "validity of the [Board's] *Collyer* doctrine is a question of unusual importance in the administration of the National Labor Relations Act." Pet. p. 7.

2. A further major function of this Court is to preserve the integrity of its own reasoned precedents. For this reason it is significant that the Board's attempted distinction of *Alexander* v. *Gardner-Denver*, 415 U.S. 36 (Pet. pp. 10-13) rests on misconceptions of *both* statutes which it is comparing. It is inaccurate to state that Congress "chose to rely on private suits as the primary means of vindicating the rights of individuals conferred by Title VII" of the Civil Rights Act (Bd. Br. p. 8). For, as was explained in *Alexander*, it is a prerequisite for a private suit under Title VII that the prospective plaintiff file a timely charge of employment discrimination with the EEOC and receive and act upon the EEOC's statutory notice of the right to sue (415 U.S. at 47). Incredibly, the Board also misstates the remedial scheme under the National Labor Relations Act: "In contrast to the situation under Title VII, the 'parties' referred to [in § 203(d)]—the union and employer—are the same in either the Board or the grievance proceedings." (Bd. Br. p. 9). Of course, the right to file a charge and to appear as a party in an unfair labor practice proceeding before the Board is not limited to unions and employers. Indeed, the right of an employee to file a charge is protected against restraint by his employer (§ 8(a)(4) of the Act), his union (§ 8(b)(1)(A) of the Act as interpreted in *Labor Board* v. *Marine and Ship Building Workers*, 391 U.S. 418), or a State (*Nash* v. *Florida Industrial Commission*, 389 U.S. 235).

Thus, the analogy which this Court drew in *Alexander* between the remedial schemes under the Civil Rights Act and the National Labor Relations Act (415 U.S. at 50) was entirely sound; compare *Alexander, id.* at 47 ("parallel or overlapping remedies"), with

NLRB v. *Strong,* 393 U.S. 357, 360 ("concurrent overlapping remedies"). Like the Tenth Circuit decision which was reversed in *Alexander,* the Board's *Collyer* policy subordinates statutory rights to contractual rights. Certiorari should be granted to decide the question—not raised in *Provision House Workers,* No. 73-1593, to which respondents would assimilate this case—whether *Alexander* and *Collyer* can co-exist.

3. Finally, respondents' insistence (Bd. Br. p. 7; Co. Br. pp. 2-3) that the *Collyer* policy is merely an exercise of Board discretion, brings into play this Court's traditional responsibility—frequently exercised in Labor Board cases—to confine administrative discretion within the bounds established by Congress. While "the Board has 'considerable discretion to * * * decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act' " (Bd. Br. p. 7), Congress has already declared one of those "fundamental aims" to be "to give impetus to the various ways of settling labor disputes * * * [and] to emphasize and protect, in cases of doubt, and to give priority to, statutorily declared rights", *NLRB* v. *Huttig Sash & Door Co.,* 377 F.2d 964, 969-970 (C.A. 8) (Pet. pp. 15-16), a case respondents prefer to ignore. In making this choice (see Pet. p. 13), the Taft-Hartley Congress adhered to the view of the Wagner Act Congress which, during the passage of the bill had stricken a provision whereunder

> "the Board may, in its discretion, defer its exercise of jurisdiction over any such unfair labor practice in any case where there is another means of prevention provided for by agreement . . . ." 1 Leg. Hist. of the National Labor Relations Act (1935) at p. 1301; II *Id.* at p. 2351.

In sum,

> "where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' American Ship Building Co. v. National Labor Relations Board, 380 U.S., [300] at 318.
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> * * * Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.' National Labor Relations Board v. Babcock & Wilcox Co., [351 U.S. 105] at 112-113." *Labor Board* v. *Brown,* 380 U.S. 278, 292.

CONCLUSION

For the reasons stated herein and in the Petition, certiorari should be granted.

Respectfully submitted,

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